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IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1969~~ 70

No. [redacted] 265

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CLARK'S GAMBLE CORPORATION D B A CLARK'S DISCOUNT DEPARTMENT STORE, ET AL.,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR M. N. LANDAU STORES, INC. IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (App. 11-14),[1] following the remand by this Court, 396 U.S. 23, is reported at 422 F. 2d 845; its initial opinion (App. 17-20) is reported at 407 F. 2d 199. The decision and order of the Board are reported at 168 NLRB No. 43.

[1] "App." refers to the Appendix to the petition, which appears at pp. 13-62 of the petition. "J.A." refers to the portions of the record printed as a Joint Appendix in the court below.

JURISDICTION

The judgment of the court of appeals (App. 15) was entered on March 4, 1970. The Board's petition for rehearing *en banc* was denied on April 10, 1970 (App. 16). The jurisdiction of this Court is invoked by the Board under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether enforcement may be refused to a bargaining order of the National Labor Relations Board on the ground that the union in whose favor the order ran may have lost its majority status through employee turnover during a period of inordinate delay by the Board in case processing?

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (161 Stat. 136, 73 Stat. 519, U.S.C. 151, *et seq.*) are as follows:

> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

STATEMENT

On December 22, 1964, Local 1262, Retail Clerks International Association, AFL-CIO,[2] claiming to represent a majority of employees at two stores owned by M. N. Landau Stores, Inc.[3] and located at Glens Falls and Saratoga Springs, New York, made a demand on the Company for recognition and bargaining (J.A. 49a, 57a). That same day the Company expressed a good faith doubt in the Union's claim and suggested that the Union seek a Board election

[2] Hereinafter referred to as the "Union".
[3] Hereinafter referred to as the "Company".

(J.A. 27a). When the Union did not do so, the Company filed a petition for an election with the Board (J.A. 27a). That petition was dismissed by the Board's Regional Director upon the issuance of the complaint herein on September 23, 1965 (J.A. 27a). The charge which originated this complaint had been filed by the Union on January 7, 1965 (J.A. 26a).

After a hearing, a decision on the complaint was issued on December 30, 1966, by the Board's Trial Examiner who found that the Union's bargaining demand had been made in an inappropriate two-store unit, but who went on to consider "whether the Company committed unfair labor practices of such a nature as to render appropriate the issuance of a bargaining order" in the Glens Falls store alone (J.A. 28a). The Trial Examiner found violations of Section 8(a)(1) which involved only six of the 77 employees in the store (J.A. 34a, 57a). He dismissed allegations of several other unfair labor practices.

The Trial Examiner then considered the proper remedy for the unfair labor practices found and concluded:

> Having found only isolated violations of Section 8(a)(1), I conclude that . . . the unfair labor practices are not sufficient to invoke the *Joy Silk* doctrine, and that a bargaining order is not called for here to remedy the 8(a)(1) violations (J.A. 35a).

Almost one year later, on November 16, 1967, the Board issued its decision and order reversing the Trial Examiner on the allegations of Section 8(a)(1) violations in which he had found no merit (J.A. 46a-49a), and ordering bargaining as a remedy for the 8(a)(1) unfair labor practices (J.A. 58a).

The total time elapsed between the Union's claim of majority status and the issuance of the Board's decision and order was slightly more than thirty-five (35) months.

The United States Court of Appeals for the Sixth Circuit affirmed the Board's 8(a)(1) findings as supported by substantial evidence while expressing the opinion that, "were it our function to reach an independent determination on the basis of the record it is probably that it would be at variance . . ." (App. 15). However, the court declined to enforce the Board's bargaining order because of the probability of extensive turnover during the thirty-five (35) month hiatus between the original unfair labor practice charge and the issuance of the Board's order, and remanded the case for a determination of "the extent to which there has been a change in the identity of the employees since the time demand for recognition was made" (App. 16-17).

The case then came before this Court on the Board's petition for a writ of certiorari, No. 439, October Term 1969, certiorari granted and judgment vacated and remanded for "further consideration in light of *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575" (396 U.S. 23).

On remand, the court of appeals reiterated its disapproval of administrative delay emphasizing that "the delay was not occasioned by procrastination or delaying tactics on the part of the respondent, but rather by the Board and its employee [the Trial Examiner]" and that "[T]here is no suggestion in the record, much less any finding, that the present petitioner was guilty of any delaying tactics calculated to dissipate the majority status or otherwise" (App. 12-13).

The Court concluded that *Gissel* was not determinative of the issue at bar and restated its previous refusal to enforce the Board's order and its remand for the purpose of examining the effect of employee turnover during the period of inordinate delay.

ARGUMENT

1. The Sixth Circuit's refusal to enforce the Board's bargaining order in the instant case was appropriate. The court observed that the turnover in retail personnel is frequent. Due to the extraordinary delay on the part of the Labor Board, enforcement of the Board's order now would impose collective bargaining on a group of employees who never authorized such representation. This would constitute a frustration of the concept of free choice embodied in Section 7 of the Act. The new employees would necessarily be denied representation by a labor organization of their own choice or the right to refrain from such representation.[4]

A court of appeals has now applied the principles set forth in the dissent of Chief Judge Lumbard in *National Labor Relations Board v. Staub Cleaners, Inc.*, 418 F. 2d 1086, certiorari denied, 397 U.S. 1038 and we contend that the Court should approve those standards. In discussing the inordinate lapse of time in that case Judge Lumbard outlined a situation much like the instant case:

> The long delay between the expression of employee choice and final enforcement is due almost entirely to the time the Board itself has taken to process this case. Meanwhile there has been an almost complete turnover of the . . . employees.
>
> * * * * * *
>
> Thus, a proceeding designed to secure speedy recognition for the choice of employees has — primarily by the action of the Board itself —, been emasculated to the point where it can be said beyond doubt that there

[4] In a situation in which the work force changed because of an illegal runaway shop the Board was able to fashion an appropriate remedy short of a bargaining order (*Garwin Corporation*, 169 NLRB No. 154, enforced per curiam __ F. 2d __, 70 LRRM 2465, certiorari denied 395 U.S. 980) after the court of appeals refused enforcement of its initial bargaining order. *Local 57, I.L.G.W.U. v. National Labor Relations Board*, 374 F. 2d 295, certiorari denied, 387 U.S. 942.

> is no basis whatever for supporting that [the union] is the choice of the employees for whom it is now empowered to act (418 F. 2d at 1090).

Judge Lumbard then states a policy of bold judicial action to correct the Board's lack of speed and the resultant injustice worked upon the new employees:

> Surely where the lapse of time is chargeable to the snail-like pace of the Board there must be some point at which the courts have the duty to withhold a grant of enforcement (418 F. 2d at 1091).
>
> * * * * * *
>
> The only way to put an end to such inordinate delays; and to prevent even longer delays, is to tell the Board that the federal courts will not issue an order of enforcement when it is apparent that, because of lapse of time for which the Board is responsible, such order is wholly inappropriate as it would no longer be relevant to the situation which the proceeding was originally designed to correct. (418 F. 2d at 1092-93).

The cases on which Petitioner places its main reliance, *Frank Bros. v. National Labor Relations Board*, 321 U.S. 702; *National Labor Relations Board v. Katz*, 369 U.S. 736; and *Gissel* rest on a two-part rationale: first that to refuse enforcement of the Board's order would be to reward employers for their own delay and secondly that the new employees, who did not initially choose the union can decertify it at a later date. Both of these reasons suffer in the light of reality.

In the instant case it is clear that the employer did not attempt to delay an election in order to frustrate organization, but in fact filed a petition for an election when the union refused to follow its suggestion to do so. The time-lag here was attributable to factors completely in the hands of the Board, including the consolidation of unconnected

cases, over the opposition of Respondent, and subsequent severance of those cases months later; and an eleven and one-half (11½) month hiatus between the Trial Examiner's decision and the Board's decision and order reversing.[5]

Furthermore, an exhaustive compilation of Board cases demonstrates that employers do not commonly engage in delaying tactics.[6] In a study of 1,008 cases over a five (5) year period in which the Board had found, either formally or informally a bargaining obligation to exist:

> The legal standards of bargaining have been extremely pervasive and have influenced employer behavior in a manner that, in general and on the whole, has been consistent with the Congressional mandate. Employers, by and large, take their obligations in this area seriously and most of them have accepted Board policies and procedures in their dealings with unions.[7]

To rely on the second point, in all candor, ignores the realities of modern labor-management relations which make it almost impossible for rank-and-file employees, without trained organizers or adequate funds, to secure the showing of interest needed to support a decertification petition, especially under the stringent standards the Board imposes prohibiting any employer participation. This is well-documented by the miniscule number of decertification petitions filed each year.[8]

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[5] Indeed, an additional year's delay was avoided by the Respondent's seeking review of the Board's decision and order rather than awaiting a Board petition for enforcement (See 418 F. 2d 1092).

[6] P. Ross, *The Labor Law in Action — An Analysis of the Administrative Process Under the Taft-Hartley Act* (1966).

[7] Id. at 2.

[8] In fiscal 1968 the Board closed, conducted a total of 8,317 elections of which only 244 were of the "RD" or employee — petitioned decertification type. *Thirty-Third Annual Report of the National Labor Relations Board* (1968). Moreover, the alternative procedure of the employer filing a decertification petition has been made almost impossible by recent Board decision. See *United States Gypsum Company*, 157 NLRB No. 60; *Terrell Machine Co.*, 173 NLRB No. 230; *Burroughs Corporation*, 180 NLRB No. 72.

2. The Board's suggestion for summary reversal of the court of appeals completely ignores the peculiar circumstances in this case, both of Board delay and the "minimal impact on the election machinery" (393 U.S. at 615) of the alleged unfair labor practices.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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